Kentucky Law Journal

Volume 60 | Issue 1 Article 11

1971

Public Schools: Serrano v. Priest--A Challenge to Kentucky

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PUBLIC SCHOOLS: SERRANO V. PRIEST—A CHALLENGE TO KENTUCKY

> Partiality and selectivity that favor any child at the expense of another, or deny any youngster an opportunity available to his neighbor have no longer any place in our schools. They never did, in principle, but now we mean to bring our practices abreast of our principles. And the task of reconciling practice with precept is the central task of those who lead our schools.[1]

I. EQUAL PROTECTION IN PROPERTY TAXATION

A. *The Traditional Analysis*

In *Serrano v. Priest*,[2] the Supreme Court of California declared that a system of financing schools, by a tax on property within the school district, amounts to an unreasonable classification of tax revenue and thus violates a taxpayer's right to equal protection of the laws. In so construing the fourteenth amendment to the Federal Constitution, the court significantly departed from the traditional theory that school financing arrangements are a matter of state prerogative. In rejecting this basic view, the court determined that such a tax system impinges on the fundamental right to education. The ramifications of this decision are nationwide as forty-eight more states finance their public schools through similar means.[3] "At issue is the whole structure of the financing of American education."[4] For this reason, traditional concepts must be examined and compared with the rationale as presented in *Serrano*.

The equal protection clause of the fourteenth amendment of the federal constitution has become the determining factor in granting federal review of state laws which classify the use of tax funds. As early as 1890, the Supreme Court of the United States cautiously recognized that there were perhaps constitutional limitations governing the formation of discriminatory classification schemes. In *Bell's Gap v. Pennsylvania*,[5] the Court indicated that if a tax employed ". . . clear

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[1] Fischer, *Our Schools: Battleground of Conflicting Interests*, reprinted as foreword to ch. 5, J. COONS, W. CLUNE, & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (1970).

[2] *Serrano v. Priest*, —— Cal. Repr. ——, —— P.2d —— (1971). At publication, the official citation was unavailable. A full reprint of the decision can be found in URBAN AFFAIRS, A SPECIAL REPORT, September 2, 1971.

[3] Christian Science Monitor, Sept. 3, 1971, at 1, col. 5.

[4] *Id.*

[5] 134 U.S. 232 (1890).

and hostile discrimination against persons and classes, the equal protection clause might be a constitutional bar, especially if the tax were unusual in character and unknown to traditional government."[6] Although the limitation imposed was not particularly burdensome, it did mark the introduction of the Supreme Court into federal review of state tax matters. Prior to *Bell's Gap* a federal court in California had previously set forth a basic standard for judging state tax classifications. The court there held that a classification devised to produce, or which necessarily results in, gross inequality to those subject to the tax is unconstitutional under the equal protection clause.[7] This position was echoed in the *Bell's Gap* litigation. Neither this nor later judicial pronouncements prohibited classification *per se* nor did they demand "an iron rule of equal taxation" for all persons or property.[8] Under this basic theory any classification which was not *grossly* unequal was permissible providing that the basis for classification had a reasonable relation to an end that the state could constitutionally seek.[9] Traditionally, state courts have followed this standard by upholding reasonable classifications.[10]

Overall, the courts have tended to allow state legislatures considerable discretion in establishing classifications[11] so long as they are relevant to a legitimate state goal.[12] The Supreme Court presumes such classifications are based on adequate grounds.[13] In explaining the basis for this presumption, the Court has indicated that it is not its function to analyze the propriety of a tax classification or to criticize the state's public policy that prompted an enactment.[14] As a result, the Court has stated that in tax matters a state could classify in a manner that exempts certain property from taxation; imposes different taxes upon different trades and professions; varies the rate on products; taxes real and personal property differently; and taxes

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[6] *Id.* at 237.

[7] County of Santa Clara v. Southern Pac. R.R. Co., 18 Fed. 385 (C.C.D. Cal. 1883).

[8] Bell's Gap R. R. Co. v. Penn., 134 U.S. 232 (1890).

[9] McGowan v. Maryland, 366 U.S. 420 (1961); Watson v. State Comptroller, 254 U.S. 122 (1920).

[10] Schrey v. Ablison Steel Mfg. Co., 255 P.2d 604 (Ariz. 1953); Freeman v. City of Neligh, 53 N.W.2d 67 (Neb. 1952); Watauga Valley Gas Co. v. Evans, 241 S.W.2d 511 (Tenn. 1951); Patterson v. Chattanooga, 241 S.W.2d 291 (Tenn. 1951); Dorrance v. Douglas County, 32 N.W.2d (Neb. 1948); Gratiot County v. Federspiel, 20 N.W.2d 131 (Mich. 1945).

[11] Madden v. Commonwealth, 309 U.S. 83 (1940).

[12] Barrett v. Indiana, 229 U.S. 26 (1913); Jones v. Jones, 65 S.W.2d 460 (Ky. 1928).

[13] Madden v. Commonwealth, 309 U.S. 83 (1940).

[14] Tax Comm'r v. Jackson, 283 U.S. 527 (1931).

visible property while exempting from taxation securities for payment on money.[15]

Due to this deference to state discretion and the presumption of reasonableness of classification, anyone challenging a statute has the burden of showing that it is "so lacking in any reasonable basis as to be arbitrary."[16] In addition, this party must prove that any resulting discrimination is not insubstantial[17] and that he personally is adversely affected by the discrimination of which he complains.[18] Thus a classification does not impinge on the equal protection clause because "it is not made with mathematical nicety or . . . results in some inequality."[19] It is because of this presumption of constitutionality, and the burden of proof imposed on one challenging a state classification, that there has been little litigation seeking the invalidation of state taxing systems. Perhaps the underlying reason is the recognition by the Supreme Court that "the power of taxation is fundamental to the very existence of the states."[20] For these reasons the equal protection clause has been invoked to strike down state levies in only two specific areas: (1) intentional discrimination in assessments and (2) discrimination against foreign corporations.[21]

In matters other than tax classifications, however, the federal courts have been more active in requiring state laws to comply with the federal equal protection mandate. If a state enactment affects a right that is deemed to be fundamental, a different standard has been applied. Rather than deferring to the state's prerogatives by means of a presumption of reasonableness in these areas, the Supreme Court has "set in judgment upon the very purpose and on the objective effect of legislation."[22] Where fundamental rights have been involved, for example, in the school desegregation cases,[23] the reapportionment decision,[24] the indigent and criminal justice cases[25] and the voting

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[15] Bell's Gap R.R. Co. v. Penn., 134 U.S. 232 (1890).

[16] Borden's Farm Prod. Co. v. Ten Eyck, 297 U.S. 251 (1936).

[17] Dolley v. Abilene Nat'l Bank, 179 F. 461, (8th Cir. 1910), *Aff'd* 228 U.S. 1 (1913).

[18] Hess v. Mullaney, 213 F.2d 635 (9th Cir. 1954).

[19] Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

[20] Tax Comm'r v. Jackson, 283 U.S. 527 (1931); Brown-Foreman Co. v. Ky., 217 U.S. 563 (1910); Southwestern Oil Co. v. Texas, 217 U.S. 114 (1910); Bell's Gap R.R. Co. v. Penn., 134 U.S. 232 (1890).

[21] Legislative Reference Service, CONSTITUTION OF THE UNITED STATES OF AMERICA 1285 (1964).

[22] Coons, Clune, and Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CAL. L. REV. 305 (1969).

[23] Griffin v. County School Bd., 377 U.S. 218 (1964); Brown v. Bd. of Educ., 374 U.S. 483 (1954).

[24] Gray v. Sanders, 372 U.S. 368 (1963).

[25] Tate v. Short, 39 U.S.L. Week 4301 (1971); Williams v. Illinois, 399 U.S. 235 (1970); Roberts v. LaVallee, 389 U.S. 40 (1967); Anders v. Cal., 386 U.S.

(Continued on next page)

rights cases,[26] the Court has subjected state laws to special scrutiny.[27] In these areas a state act will be permissable only if it is based on a "compelling state interest" as a much narrower presumption of constitutionality will be employed.[28]

In summary, whenever a court is faced with a challenged state enactment, it uses a two level approach. First, it examines the nature of the matter to determine whether it affects a fundamental or nonfundamental right. Then it applies the standard required by the nature of the right involved. If the matter is of fundamental interest, only a limited presumption of constitutionality is appropriate, and the court will subject the matter to close scrutiny to ascertain whether the state's action impinges on protected rights. However, if the matter is nonfundamental, a heavy burden of proof is required to overcome the presumption of constitutionality and the traditional deference to state policy and discretion. Until *Serrano,* any taxpayer challenging classifications designed to support public education would have to satisfy this latter burden.

Serrano deemed education to be a matter of *fundamental interest,* thus, under *Serrano* any classification relative to education will be carefully examined to determine if a compelling state interest justifies the financing scheme.

B. *The Serrano Approach*

The method of financing in *Serrano* is similar to those of most other states.[29] Basically, it empowers local governing bodies to levy taxes on real property within a school district.[30] The tax rate depends on the assessed value of real property within the district and on the school budget. Upon examination of these factors, the court in *Serrano* concluded that under this system the quality of a child's education was

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738 (1967); Douglas v. Cal., 372 U.S. 353 (1963); Smith v. Bennett, 365 U.S. 708 (1961); Burns v. Ohio, 360 U.S. 252 (1959); Griffin v. Illinois, 351 U.S. 12 (1956).

[26] McDonald v. Bd. of Educ., 394 U.S. 802 (1969); Harper v. Bd. of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964).

[27] *See,* P. Kurland, *Equal Educational Opportunity: the Limits of Constitutional Juriprudence Undefined,* 35 U. OF CHI. L. REV. 583 (1967-68).

[28] McDonald v. Bd. of Educ., 394 U.S. 802 (1969).

[29] The California court in applying the fourteenth amendment glossed over the state action required to apply the equal protection clause. However, the court's action is in keeping with the general approach to state action.

> [T]he involvement of the state need not be exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral, or its action was only one of several cooperative forces leading to the constitutional violation.

United States v. Guest, 383 U.S. 745, 755-56 (1966).

[30] West. Cal. Educ. Code § 20701 (West 1969).

directly dependent upon the wealth of the district. The court then proceeded on the basis of two major propositions: (1) any classification based on wealth was a suspect classification which required the court to subject the system to strict scrutiny. (2) The tax classification directly affected education, a matter of fundamental interest to individuals and society. Applying these precepts, the court held that because California failed to meet the burden of showing a compelling state interest the taxing pattern was in violation of the equal protection clauses of both the state and federal constitutions. In so holding, the court rejected arguments of defendants that the classification should be saved (1) because funds were applied to ensure a minimum level of financing for every district and (2) because, even if the system were a classification based on wealth, it was *de facto* and not *de jure*. With reference to the first proposition the California court clearly displayed what some have referred to as a "special judicial hostility towards official discrimination, be it *de jure* or *de facto*, according to pecuniary circumstance."[31] The effect of such hostility is that whenever a suspect classification encroaches on a fundamental interest, a "constitutional tilt sign flickers . . . suggesting a super-likelihood of invalidity."[32]

The effect in *Serrano* was to displace the traditional presumption of reasonableness of a tax classification with a standard demanding a "compelling state interest" to justify the enactment. The court cited several Supreme Court cases as authority for the proposition that classifications based on wealth are suspect.[33] A review of the cited cases indicates that they fall into two categories: those where wealth was linked with voting rights and those where wealth was linked with criminal procedural issues. It is uncertain whether the Supreme Court regards wealth classifications *per se* as suspect or whether it regards them as suspect when linked with voting and criminal procedure issues. The tradition of the court's deference to states in the property tax system of school financing suggests that wealth in isolation may not be suspect. Since *Serrano* holds that wealth *per se* is suspect, it, in essence, departs from tradition and ventures into a completely new area.

In discussing the second proposition the court stated that education is a major determination to one's chances for economic success and

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[31] Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 19 (1969-1970).

[32] *Id.*

[33] Tate v. Short, 39 U.S.L. Week 4301 (U.S. March 2, 1971); Williams v. Illinois, 399 U.S. 235 (1970); Roberts v. LaVallee, 389 U.S. 40 (1967); Anders v. California, 386 U.S. 738 (1967); Douglas v. California, 372 U.S. 353 (1963); Smith v. Bennett, 365 U.S. 708 (1961); Burns v. Ohio, 360 U.S. 252 (1959); Griffin v. Illinois, 351 U.S. 12 (1956).

that it exerts a strong influence on a child's development and future role in modern society. The court noted *Brown v. Board of Education*[34] as an example of the "significance of learning" and also drew an analogy between the fundamental rights of education and those discussed in the voting rights cases.

In addition the court distinguished the Supreme Court's recent decision in *McInnis v. Ogilvie*[35] which had upheld a state's financing education through property taxes. In that case the plaintiff asserted that the equal protection and due process clauses of the fourteenth amendment could be satisfied *only* by a financing system that apportioned public funds according to the educational needs of students. A three judge district panel held that no cause of action was stated because: (1) the fourteenth amendment does not require that public school expenditures be made only on the basis of educational needs, and (2) the lack of a judicially manageable standard made the controversy nonjusticiable. In holding the strict scrutiny standard of review inapplicable, the court upheld the financing scheme. *Serrano* was distinguishable because (1) it does not allege that the only way to satisfy the fourteenth amendment was on the basis of educational needs and (2) there is a judicially manageable principle in the allegation that education based on wealth is unconstitutional.

Having established the position that classifications based on wealth are suspect and that education is a fundamental interest, the court reviewed the California school financing laws. In its analysis, the court cited several Supreme Court cases as supportive of its decision. However, these cases are distinguishable from *Serrano* in that the Supreme Court applied the constitutional tests, relied on by the *Serrano* court, in a restrictive manner, focusing on the wording of the statute. The *Serrano* court included in its analysis the *results* of applying a statute that on its face did not involve wealth classifications. An example of the Supreme Court's more restrictive approach is clearly demonstrated in *McDonald v. Board of Election Commissioners*,[36] where the Court examined a statute that extended absentee voting rights to four classes of people. Therein the plaintiffs unsuccessfully challenged the act on the theory that by omitting any absentee voting privileges for those imprisoned out of their county the statute was a classification that impinged on a fundamental interest. The claim was that, as written, the statute impinged on fundamental rights. In *Williams v. Illinois*[37] the Court struck down a state statute which provided that one

[34] 347 U.S. 483 (1954).
[35] 394 U.S. 322 (1969).
[36] 394 U.S. 802 (1969).
[37] 399 U.S. 235 (1970).

unable to pay a fine should be imprisoned until he worked off the amount due. In *Roberts v. LaVallee*[38] the plaintiff successfully attacked a New York statute that required one to pay a fee before receiving a court transcript. In *Anders v. California*,[39] *Douglas v. California*,[40] *Smith v. Bennett*,[41] *Griffin v. Illinois*,[42] *Harper v. Virginia State Board of Electors*,[43] *Tate v. Short*,[44] and *Burns v. Ohio*,[45] the Supreme Court similarly invalidated state acts where classifications based on wealth impinged on fundamental rights. All of these cases however differ from *Serrano* in that they focus on the wording of the statute, not the result of applying the statute. In those cases the statute or procedure on its face was clearly a classification that affected an established fundamental interest. In *Serrano*, however, the California system of financing public schools does not on its face classify by wealth. Differences in revenue obtained under this system resulted from *applying* the California law. In addition the difference in revenue in any given district is fortuitous and changes over a period of years. Districts that are presently affluent were perhaps once poor. This distinction is neither idle nor academic. If an enactment is suspect because the result produces greater revenue in one area than that produced in other areas, many presently sanctioned practices are similarly open to attack. To label all such matters suspect would undermine traditional federal deference to states in a variety of situations.

II. BEYOND SERRANO

A. *National Consequences*

If the analysis of the California Supreme Court in *Serrano* is accepted, the consequences for other states are substantial and should be felt in the near future. Even if review by the Supreme Court is not sought, the *Serrano* reasoning should have a very persuasive effect in similar suits in other states. Such suits are now pending in Florida, Michigan, New Jersey, Texas, and Wisconsin. In addition, other suits are either ready or nearly ready in New York, Georgia, Ohio, and North Carolina.[46] *Serrano* will be especially persuasive in litigation in

[38] 389 U.S. 40 (1967).
[39] 386 U.S. 738 (1967).
[40] 372 U.S. 353 (1963).
[41] 365 U.S. 708 (1961).
[42] 351 U.S. 12 (1956).
[43] 383 U.S. 663 (1966).
[44] 39 U.S.L.W. 4301 (U.S. March 2, 1971).
[45] 360 U.S. 252 (1959).
[46] Courier Journal, Aug. 31, 1971, § A, at 14. The following news item may evidence a belief of some federal officials that the *Serrano* decision has broader

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other states because it will be very difficult, if not impossible, to distinguish that case on its facts. Every state, with the exception of Hawaii, whose educational system is entirely state financed, has a similar system of local collections with a superimposed second system of state assistance.[47] The proportion of state aid varies widely as does the means for determining how it will be administered, but the end result of these systems with the exception of Hawaii, is more or less similar to the California system attacked in *Serrano*.

A brief description of the type of systems used throughout the United States illustrates the nationwide implications of *Serrano*. In terms of its effect upon the impact of wealth differentials (difference between the aggregate value of property taxable for school purposes) between districts, there are basically three forms of state *aid* to education:

> (1) Equalizing (state aid reduces the impact of wealth differentials between districts.)
> (2) Non-Equalizing (state aid has no effect on the impact of wealth differentials between districts.)
> (3) Anti-Equalizing (state aid intensifies the impact of wealth differentials between districts.)[48]

Furthermore, with respect to the classification of the *administration* of state aid, there are four systems: (1) Flat grant, (2) Foundation plan, (3) Combination plan, and (4) Percentage equalizing.[49]

Flat Grant

The Flat Grant is a system under which a specified amount of money is paid by the state to each district per pupil or other unit of measurement, such as classroom unit. The flat grant is normally non-

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implications as to differentials in educational offering between states due to their relative wealth rather than just differentials between *districts within the same state*:

> A national tax for schools was endorsed by HEW Secretary Richardson after Nixon met for more than an hour with representatives of nine elementary and secondary school organizations. Richardson said Nixon ordered federal education officials to reexamine the role of the local property tax in public school financing in light of a California Supreme Court decision that it is unconstitutional. Richardson didn't indicate what form a "more broadly based national tax" might take, or whether Nixon committed himself to such a plan during the meeting.

The Wall Street Journal, Oct., 1971 at 1, col. 3.

[47] Coons, Clune, & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305, 312 (1969).

[48] *Id.* at 313.

[49] Coons, Clune, and Sugarman analyze state aid systems as being basically three: flat grant, foundation plan, and percentage equalizing. They note, however, that many states employ a variation consisting of foundation plans and flat grants combined which they call combination plans. *Id.*

equalizing but it could tend to be equalizing or anti-equalizing if the source of the state funds was, respectively, a strongly progressive or regressive income tax. If the grant was very large, it could subsume local aspirations to provide for education and thus tend to be equalizing. Such a grant is anti-equalizing if it is given on the basis of a revenue unit such as "per teacher hired" since wealthier districts can hire more teachers.[50]

Foundation Plan

The Foundation Plan is essentially a system under which a state guarantees to the school district that if the district taxes itself at a specified minimum rate, the state will insure that the district will have a specified number of dollars available per pupil or per other unit of measurement. Foundation plans tend to be equalizing to an extent but they can never eliminate the effect of wealth disparity.[51] As between a wealthy district and a poor one, if the amount of money per pupil guaranteed by the state and the minimum qualifying taxing rate are set in such a manner that the wealthy district raises more revenue locally than the state guarantees (and thus receives no funds from the state) and the poor district raises less revenue than the state guarantees, the state fund paid to the poor district is equalizing, though it does not result in equality. It does not result in equality because the poor district will only receive enough funds from the state to increase its revenue to the state guaranteed minimum amount per pupil and the wealthy district will have exceeded that amount through locally raised revenue.

If, on the other hand, the state guarantee and the minimum qualifying taxing rate are set so that the wealthy district also raises less revenue than the state guarantees, the state funds paid to the poor district are equalizing only up to the amount of revenue that the wealthy district raised by its own local taxation. Beyond that point, the state fund is given to each district without regard to wealth variations and is thus non-equalizing. As one authority points out, even where all the state aid is equalizing, a foundation plan cannot achieve full equalization because above the level guaranteed as a "foundation" by the state, equal local efforts produce revenue directly proportional to the wealth of the district, thus less effort is required of the wealthy district than of the poor district to offer the same financial level of educational offering above the foundation level.[52]

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[50] *Id.* at 313-14.
[51] *Id.* at 314-15.
[52] *Id.* at 315.

Combination Plan

A Combination Plan is a plan made up of both a flat grant and a foundation plan and commonly employed in one of two ways. Under one method the flat grant is simply added to whatever foundation money is due a district [under this method the flat grant may be equalizing, or anti-equalizing depending upon other circumstances as explained above in the discussion of the flat grant.] In the second method the flat grant is first added to the local revenue effort to determine the foundation funds to which the district is entitled. The effect of the second form is that districts poor enough to receive foundation funds at least equal to the flat grant receive the same amount of state aid they would have received through the foundation plan if there was not flat grant. But the districts which are wealthy enough not to qualify for foundation money still receive the entire flat grant. Commentors characterize this system as "a subsidy for the wealthy only and . . . grossly anti-equalizing."[53] It should be noted that the latter version of the system just described is the California system dealt with in *Serrano*.

Percentage Equalizing

Percentage equalizing is a plan which, supposedly, fully equalizes the wealth differentials among districts by state support of the district budget in inverse proportion to the district's relative wealth. To use the example given by commentators, if the poorest district in a state had one tenth the wealth of the wealthiest district, the state would support 90 percent of the poor district's budget while giving no support to the wealthy district. Unfortunately, there are no states which use this system in its purest form. Those states which claim to use the system have added refinements which have destroyed its equalizing effects.[54]

It is not necessary to speak of the effects of the above described systems in purely theoretical terms because there has been at least one recent empirical study conducted concerning the systems of eight states, with an analysis of the taxing and spending data of six of these states to determine their effects.[55] The conclusions of that study were summarized as follows:

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[53] *Id.*

[54] *Id.* at 316.

[55] The systems of Ohio, Nevada, Arizona, Illinois, Utah, New York, and Rhode Island were studied and taxing and spending data for the first six states were analyzed. J. COONS, W. CLUNE, & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (1970).

(1) Poorer districts in general tend to make a greater tax effort for education than do wealthier districts.
(2) Poorer districts in general have significantly lower educational offerings than do wealthier districts.[56]

B. *Consequences in Kentucky*

Having now taken a broad look at the systems in use throughout the country and found that none currently in use completely equalize the wealth differentials between school districts and that some systems in use actually exacerbate the wealth differentials, an examination of the system used in Kentucky should now be given with regard to its vulnerability to the reasoning of the *Serrano* decision. We begin with the proposition that the major source of local tax support of education is the property tax.[57] As an example, for the 1967-68 school year, total revenue from local sources was approximately $87 million, of which approximately $67 million was from the general property tax.[58] Local tax support in turn makes up a substantial percentage of the total financial support of education in Kentucky. As an example, for the 1969-70 fiscal year, locally generated revenue made up approximately 33.3 percent of the total financial support of education in the state, as compared with 51.7 percent from state funds and 15.0 percent from Federal funds.[59] Thus, it is clear that unless state aid is administered in a manner that equalizes the differentials in wealth between districts within the state, the Kentucky system is susceptible to the successful attack made against the California system. Thus, it is necessary to examine Kentucky's state system of financial support of education and to determine what the effects of state aid are in order to evaluate the Kentucky system's vulnerability to a *Serrano* type of attack .

No description of the collection of revenue from property tax sources can be comprehended without first mentioning a relatively recent, and traumatic, decision by the Kentucky Court of Appeals and the aftermath of that decision. In *Russman v. Luckett*,[60] the Kentucky Court of Appeals ruled that the existing policy of flagrant violation of section 172 of the Kentucky Constitution, and implementing statutes,[61] requiring that property be assessed at fair cash value be ended. Since the average county assessment ratio (ratio of assessed

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[56] Coons, *supra* note 47, at 317.
[57] Lynch, *Tax Support of Education in Kentucky* (Study by Spindletop Research for Ky. Dept. of Education) (Jan. 1970).
[58] 1967-68 KY. PUBLIC SCHOOL STATISTICS 26.
[59] 1969-70 RECEIPTS AND EXPENDITURES 2.
[60] 391 S.W.2d 694 (Ky. 1965).
[61] KY. REV. STAT. [hereinafter cited as KRS] §§ 132.450(1), 133.150 (Baldwin's 1970).

value to market value) was approximately 26 percent in 1965,[62] it was obvious that if the assessment on all property was increased to 100 percent of market value and tax rates were allowed to remain the same, the property tax burden would be drastically increased. Therefore, a special session of the Kentucky General Assembly was called in 1965 and that session enacted legislation commonly known as the "roll back" law which was designed to cause adjustment of tax rates downward in proportion to the increase in assessments.[63] The legislation, somewhat simplified, provided in effect that for 1966 and thereafter the tax rate in each county should be such that it produced the same revenue as was produced in 1965. The authorized tax rate in each county was defined as that rate which, when applied to the 1966 assessment of property subject to taxation for the 1965 tax year, would produce revenue approximately equal to the amount produced in 1965.[64] This legislation is important to a discussion of property taxes for school purposes because those taxes are affected by the "roll back" provisions the same as all other property taxes. As will be discussed later, this has had some rather strange effects on the equality of the educational offering of the various school districts within the state.

As indicated above, the property tax is the major local source of support for education. The property tax for school purposes consists of three types of levies: a basic general-fund levy and two levies which must be approved by the voters of a district.

The general-fund levy is authorized under Kentucky Revised Statutes [hereinafter cited as KRS] § 160.470[65] which provides that the district board of education must submit a budget which does not require more revenue from local property taxes than would have been produced by application of the preceding year's tax rate to the preceding year's assessment, excluding voted levies and net assessment growth.[66] Here we see the first example of the pervasiveness of the "roll back" legislation. The only exception to the "roll back" limitation on the district's budget is that a district can always levy at such tax rate as is necessary to generate the amount of revenue needed to meet the local tax effort required for participation in the state foundation program, which will be discussed later.[67] Other than this exception,

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[62] 1964-65 KY. DEPT. OF REVENUE ANNUAL REP. 30.

[63] KY. ACTS, ch. 2 (1965).

[64] This rate is known as the "compensating tax rate." KRS § 132.010 (Baldwin's 1970).

[65] KRS § 160.470 (Baldwin's 1970).

[66] Net assessment growth is the net difference in the total valuation of property subject to taxation in the preceding year and the total valuation of such property in the current year. KRS § 132.425 (Baldwin's 1970).

[67] KRS § 157.380 (Baldwin's 1970).

the district must levy at a rate which will not generate more revenue than that required by the "rolled back" budget.

The second local property tax for school purposes is a special building fund levy authorized by KRS § 160.477.[68] This levy must be approved by the voters of the district and its rate must not be less than 5 cents and not more than 50 cents for each $100 of property subject to local taxation. It is in addition to the maximum general-fund levy previously discussed but it is limited to the compensating tax rate.[69]

The third tax for school purposes which a school district must choose to levy is an extra general-fund levy authorized by KRS § 157.440[70] which provides that a district may exceed the maximum provided by the general-fund levy if the voters of the district approve of the additional tax. It is particularly important to note that this tax is not subject to the compensating tax rate or any other "roll back" restrictions. This provision is the only local avenue available to the school districts to increase the level of educational offering. This provision appears to have been the only reason for the Kentucky Court of Appeals to find that the "roll back" restrictions in KRS § 160.470[71] were not contrary to section 172 of the Kentucky Constitution, which provides that all property be assessed at fair cash value.[72] There is a ceiling, however, even to this particular avenue of increasing local tax revenue as it appears that this provision must be subordinated to the statutory restriction of KRS § 160.475[73] which provides that a tax levy for school purposes must not exceed $1.50 for each $100 of property subject to local taxation.

Having examined the means by which districts may generate revenue locally, let us consider how the state administers state aid and specifically, whether it is administered in a manner which equalizes the wealth differentials between districts. Kentucky calls its system a foundation program and the following brief recital of the General Assembly's intent in enacting the foundation program legislation tells a great deal about the application of the program:

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[68] KRS § 160.477 (Baldwin's 1970).

[69] *See* note 64, *supra*, and accompanying text.

[70] KRS § 157.440 (Baldwin's 1970).

[71] *See* note 65, *supra*, and accompanying text.

[72] In Miller v. Nunnelley, 468 S.W.2d 298 (Ky. 1971), it was contended that the "roll back" restrictions of KRS § 160.470 that provided that there could be no levy which would produce more revenue than that produced in 1965 had the practical effect of freezing the effective tax rates (actual tax rate mutiplied by the 1965 assessment ratio) and thus perpetuating the unconstitutional assessment ratios (unconstitutional because not 100 percent fair cash value). The Court held, however, that the taxing power of the districts was unlimited by virtue of the provision of KRS § 157.440 for a rate as high as the district might by popular vote select.

[73] KRS § 160.475 (Baldwin's 1970).

> In KRS 157.310 to 157.440 and subsection (2) of 157.990, it is the intention of the General Assembly to assure substantially equal public school educational opportunities, through a foundation program, for those in attendance in the public schools of the Commonwealth, but not to limit nor to prevent any school district from providing educational services and facilities beyond those assured by the foundation program; and to provide, as additional state funds are made available for the public schools, for the use of such funds for the further equalization of educational opportunities.[74]

Close investigation of the foundation program reveals that the program is in fact not a pure form of the foundation plan model, previously discussed,[75] but is similar to the second form of the combination plan, also discussed above.[76] A district is eligible to participate in the program if it makes the *required local tax effort*,[77] defined as the required amount of revenue to be provided by the district from local tax revenue sources only.[78] This amount is the district's proportional part of the aggregate required local tax effort for all school districts in the state,[79] which in turn is based upon a theoretical taxing effort by each district of $1.10 for each $100 of property subject to tax for school purposes[80] for the 1965-66 year and is increased each year by the net assessment growth.[81] A district is entitled to exceed the statute $1.50 tax rate ceiling[82] where necessary to provide the required local tax effort.[83]

Once it has been determined that a district's local tax effort enables it to qualify for participation in the state foundation program, a determination is made as to the total cost of the foundation program in that particular district. KRS § 157.390 provides that this determination will be made by adding the four following amounts:[84]

(1) The product of the number of teachers in the district multiplied by the salary set forth in the biennial budget for teachers of various ranks,[85] the number of teachers in the computation not to exceed the number of class room units allowed the district by KRS § 157.360.[86]

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[74] KRS § 157.310 (Baldwin's 1970).
[75] *See* notes 51 and 52, *supra,* and accompanying text.
[76] *See* note 53, *supra,* and accompanying text.
[77] KRS § 157.350(4) (Baldwin's 1970).
[78] KRS § 157.320(1) (Baldwin's 1970).
[79] KRS § 157.380 (Baldwin's 1970).
[80] KY. ACTS, ch. 2, § 15 (1965).
[81] KRS § 157.380 (Baldwin's 1970) and *see* note 66, *supra,* and accompanying text for definition of net assessment growth.
[82] *See* note 73, *supra,* and accompanying text.
[83] OP. KY. ATT'Y GEN. 65-600 (1965).
[84] KRS § 157.390 (Baldwin's 1970).
[85] The statute classifies teachers in seven ranks based upon their education.

(Continued on next page)

(2) The product of the budgeted amounts for current expenses per class room unit multiplied by the number of classroom units.

(3) The product of budgeted amounts for capital outlay per classroom unit multiplied by the number of classroom units.

(4) The product of the allowable transportation cost per pupil per day, as determined by the superintendent of public instruction,[87] multiplied by the aggregate attendance of transported children.

The required local tax effort is deducted from the sum of the above four amounts and the remainder is the amount distributable to the district from the state foundation fund unless the distributable amount is less than $243 per pupil in average daily attendance for the 1970-71 school year or less than $247 for school years thereafter. If the amount is less, the amount distributable from the state fund is increased by the amount necessary to make the state distribution equal $243, respectively, per pupil in average daily attendance.[88] Thus the Kentucky system of state aid is, from the standpoint of equalization, very similar to the California system.[89]

While the Kentucky statutes rationalize the system as a foundation plan, it would only be a pure foundation plan if it guaranteed a total amount per pupil for each district to *spend* rather than guaranteeing that each district will *receive* at least a certain amount from the state fund. The effect of the system is that even the districts which are wealthy enough that their local tax effort equals or exceeds the total cost of the foundation program [sum of (1), (2), (3), and (4) above minus the required local tax effort] will receive the $243 ($247) per pupil minimum. At the same time, the district which is poor enough that the total cost of the foundation program is at least $243 ($247) per pupil will receive the same amount it would have received if the provision guaranteeing $243 ($247) as the amount distributable from the state fund had never been enacted. Thus only the wealthier districts benefit from this provision and it is therefore anti-equalizing whether the system is called a foundation plan, combination plan, or whatever.

Another aspect of the system in Kentucky which is especially

(Footnote continued from preceding page)
KRS § 157.390(1)(a) (Baldwin's 1970).

[86] The statute provides for the allotment of classroom units for elementary and secondary schools; vocational education; special instructional services for exceptional children; superintendents, principals and their assistants; and special instructional personnel. E.g., for elementary and secondary schools, one classroom unit is allocated for each 27 pupils in average daily attendance. KRS § 157.360 (Baldwin's 1970).

[87] KRS § 157.370 (Baldwin's 1970).

[88] KRS § 157.400 (Baldwin's 1970).

[89] *See* note 53, *supra,* and accompanying text.

pernicious is that of the "roll back" provisions described above.[90] These provisions effectively prohibit any district from raising the level of its educational offering by employing a higher taxing rate to produce more local revenue for school use. While it is true that KRS § 157.440[91] is an exception to the "roll back" provisions and allows a district to vote itself a higher tax rate, current public attitude toward tax increases makes this particular provision a hollow promise. Thus districts are effectively saddled with a tax rate from prior years which insures that the educational offering of the poorer districts will not be improved by an increased local tax effort.

The *Serrano* decision was primarily concerned with the *effect* of the state system of educational support and not the mechanics of its operation. Obviously any detailed analysis of empirical data to determine the effects of the Kentucky system is beyond the scope of this article. However, it might be interesting to note some examples of the system's more noticeable effects by comparing two Kentucky school districts on opposite ends of the wealth spectrum.

Leslie County School District had an estimated per capita income in 1968 of $892[92] and an assessed valuation of $7180 per child.[93] The district expended $309.56 per pupil in average daily attendance during the 1967-68 school year.[94] During the same period of time, the Jefferson County School District, which had an estimated per capita income of $3547[95] and an assessed valuation of $34,095 per child,[96] expended $461.67 per pupil.[97] The reason for the disparity appears to be due to the system of educational support which relies heavily on locally produced revenue from property taxes.

Leslie County was taxing at an effective rate of .467 percent[98] and Jefferson County was taxing at an effective rate of 1.047 percent.[99] Both districts qualified for participation in the state foundation program by virtue of their local tax effort. The total cost of the foundation program in Leslie County, and thus the amount distributable by the state to the district, was approximately $96,856,875[100] which, when

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90 *See* notes 60-64, *supra*, and accompanying text.
91 *See* note 70, *supra*, and accompanying text.
92 1967-68 KY. PUBLIC SCHOOL STATISTICS 5 (1968).
93 1969-70 PUBLIC SCHOOL FINANCIAL ANALYSIS 29 (1970).
94 1970 PROFILES OF KY. PUBLIC SCHOOLS 9 (1970).
95 1967-68 KY. PUBLIC SCHOOL STATISTICS 5 (1968).
96 1969-70 PUBLIC SCHOOL FINANCIAL ANALYSIS 24 (1970).
97 1970 PROFILES OF KY. PUBLIC SCHOOLS 9 (1970).
98 1969-70 PUBLIC SCHOOL FINANCIAL ANALYSIS 29 (1970).
99 1969-70 PUBLIC SCHOOL FINANCIAL ANALYSIS 24 (1970).
100 This figure was determined by subtracting the required local effort from he total state allotment for the foundation program in the district. 1968 FOUNDATION PROGRAM EXPENDITURES BY CATEGORY 26 (1968) and 1969-70 PUBLIC CHOOL FINANCIAL ANALYSIS 29 (1970).

divided by the number of pupils (3566.1),[101] equals an amount much greater than $243. However, the amount distributable to Jefferson County was $7,237,317[102] which, when divided by the number of students (77454.1),[103] equals approximately $93—thus necessitating increasing the amount distributable from the state fund by approximately $150 to make the state distribution equal $243 per pupil as provided by KRS § 157.400.[104] This then is an actual case of the economic gap being widened rather than narrowed by the system.

Few persons would argue that quality of the academic offering is determined only by the amount of money spent on education by a district, but most would agree that it is one of the most substantial factors. It is interesting to note that statistics such as the following from the two districts discussed above seem to reinforce the argument in *Serrano* that there is a close relationship between the wealth of a district, money spent on education by a district, and the educational offering of that district:

	Jefferson County	Leslie County
Average Annual Salaries for Classroom Teachers	$6,991	$4,991
Percentage of Teachers with Masters or Higher	25.23	10.00
Cost per Pupil for Instruction	$377.54	$227.09
Cost per Pupil for Educational Supplies & Books	$12.83	$.35
Percentage of High School Graduates Entering College	50.5	29.7[105]

It does not appear that any case in Kentucky has raised the *Serrano* argument—that the state system for the support of education is a discriminatory classification on the basis of wealth and touches on a fundamental interest, education, and therefore violates the equal protection clauses of the Kentucky and federal constitutions.[106] There have been cases holding that statutes which, as a result of the system of taxing and distribution of school funds, effected discriminatory classification on the basis of race, thereby resulting in poorer schools for one race, were void as being contrary to the equal protection clause of the fourteenth amendment.[107] It is only a slight jump from that fact

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[101] 1969-70 PUBLIC SCHOOL FINANCIAL ANALYSIS 29 (1970).
[102] This figure was determined by subtracting the required local effort from the total state allotment for the foundation program in the district. 1968 FOUNDATION PROGRAM EXPENDITURES BY CATEGORY 21 (1968).
[103] 1969-70 PUBLIC SCHOOL FINANCIAL ANALYSIS 24 (1970).
[104] KRS § 157.400 (Baldwin's 1970).
[105] 1970 PROFILES OF KY. PUBLIC SCHOOLS (1970).
[106] U.S. CONST. amend XIV, § 1; KY. CONST. § 3.
[107] E.g., Claybrook v. City of Owensboro, 16 F. 297 (D. Ky. 1883).

situation to the situation of *Serrano*, where wealth of the district rather than race is the prohibited classification. In any event, if and when the *Serrano* argument is raised in Kentucky, the courts will have to decide the question against the background of the Kentucky system of property tax and state aid to education (which, due to the "roll back" legislation, is probably more anti-equalizing than the California system). Will the Kentucky Court of Appeals maintain the current system of property tax as the major local source of support for education—even though its only recommendation is that it is a system with which state and local officials are familiar? Or will the court, like the California Supreme Court, force abandonment of this system, which denies its citizens an equal educational opportunity? This is the question that the Kentucky Court may soon be called upon to answer.

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